

Case 2:04-cv-05125-FVS Document 410 Filed 09/11/2006

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THE HONORABLE FRED VAN  
SICKLE

7 IN THE UNITED STATES DISTRICT COURT  
8 FOR THE EASTERN DISTRICT OF WASHINGTON  
9 AT RICHLAND

10 JAMES S. GORDON, JR,  
a married individual;

11 Plaintiffs,

12 v.

13 **IMPULSE MARKETING**  
14 **GROUP, INC., a**  
15 **Nevada/Georgia corporation;**  
16 **JEFFREY GOLDSTEIN,**  
17 **individually and as part of his**  
18 **marital community; PHILLIP**  
19 **HUSTON, individually and as**  
**part of his marital community;**  
**KENNETH ADAMSON,**  
**individually and as part of his**  
**marital community; JOHN**  
**DOES, I-X,**

NO. CV-04-5125-FVS

[SECOND AMENDED]  
COMPLAINT FOR DAMAGES UNDER  
THE CAN-SPAM ACT OF 2003 [15  
U.S.C. §7701, *et seq.*]; WASHINGTON  
CONSUMER PROTECTION ACT  
(RCW 19.86); THE WASHINGTON  
COMMERCIAL ELECTRONIC MAIL  
ACT (RCW 19.190); RCW 19.170 *et seq.*,  
and Injunctive Relief

[JURY DEMAND]

21 COMES NOW, Plaintiff James S. Gordon, Jr. and brings this COMPLAINT  
22 against defendants named herein. Plaintiff alleges the following on information and  
23 belief:  
24

25  
26  
27 NO. CV-05-5079-FVS  
28 PLAINTIFF'S FIRST AMENDED  
COMPLAINT

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1       **1. PARTIES**

2       1.1       Plaintiff James S. Gordon, Jr. ("Gordon") is a married individual who  
3                  is and was a resident of Benton and/or Franklin County, Washington, and  
4                  who was doing business as an interactive computer service located on the  
5                  internet at 'gordonworks.com', during the time of all acts complained of  
6                  herein.

7  
8       1.2       Defendant Impulse Marketing Group, Inc., ("Impulse") upon  
9                  information and belief, is a **Nevada** corporation, with its principle place of  
10                 business located in Georgia.

11  
12       1.3       Defendant Jeffrey Goldstein ("Goldstein") is an employee, officer,  
13                  director, and/or majority shareholder of Impulse, and as such controls its  
14                  policies, activities, and practices, including those alleged herein on behalf of  
15                  or as assistance to Impulse. All acts and practices undertaken by Goldstein  
16                  on behalf of Impulse and/or on behalf of himself are and were for the benefit  
17                  of his marital community. Defendant resides in the State of Georgia and  
18                  transacts or has transacted business in the State of Washington and in the  
19                  Eastern District of Washington.

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21       1.4       Defendant Phil Huston ("Huston") is or was an employee, officer,

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1 director, and/or majority shareholder of Impulse, and as such controls its  
2 policies, activities, and practices, including those alleged herein on behalf of  
3 or as assistance to Impulse. All acts and practices undertaken by Huston on  
4 behalf of Impulse and/or on behalf of himself are and were for the benefit of  
5 his marital community. Defendant resides in the State of Georgia and  
6 transacts or has transacted business in the State of Washington and in the  
7 Eastern District of Washington.

10 1.5 Defendant Kenneth Adamson ("Adamson") is an employee, officer,  
11 director, and/or majority shareholder of Impulse, and as such controls its  
12 policies, activities, and practices, including those alleged herein on behalf of  
13 or as assistance to Impulse. All acts and practices undertaken by Huston on  
14 behalf of Impulse and/or on behalf of himself are and were for the benefit of  
15 his marital community. Defendant resides in the State of Georgia and  
16 transacts or has transacted business in the State of Washington, and in the  
17 Eastern District of Washington.

18 1.6 The actions alleged herein to have been undertaken by the defendants  
19 were undertaken by each defendant individually, were actions of which each  
20 defendant had knowledge and that each defendant authorized, controlled,  
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1 directed, or had the ability to authorize, control or direct, and/or were actions  
2 each defendant assisted and/or participated in, and are actions for which each  
3 defendant is individually liable. Each defendant aided, abetted, assisted, and  
4 conspired with the actions of each other defendant herein in that each  
5 defendant had knowledge of those actions, provided assistance and benefited  
6 from those actions, in whole or in part. Each of the defendants was the agent  
7 of each of the other defendants, and in committing those acts herein alleged,  
8 was acting within the course and scope of such agency and with the  
9 permission and consent of other defendants.

10 **II. JURISDICTION**

11 2.1 This Court has original jurisdiction of the causes of action herein  
12 which are brought under the CAN-SPAM Act of 2003 – 15 U.S.C. §7701, *et*  
13 *seq.*, 15 U.S.C. §7707(g)(1).

14 2.2 The unlawful actions of the defendants were committed in the States of  
15 Washington, Georgia, and in the judicial district of this Court.

16 2.3 The Defendants regularly transact business within the State of  
17 Washington by virtue of the fact that they regularly send, initiate the  
18 transmission of, or assist others in sending, or initiating the transmission of

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1 commercial bulk emails into the State, which emails are received on  
2 computers and other electronic devices owned and maintained by residents of  
3 the State in the State. As a result of the Defendants' acts and transactions  
4 within the State of Washington, this Court has personal jurisdiction over the  
5 Defendants under RCW 4.28.185(1)(a).

6  
7 2.4 The causes of action complained of herein include allegations that  
8 commercial electronic messages sent, or initiated by or with the assistance of  
9 the Defendants to the Plaintiff violates RCW 19.190 et seq., the Washington  
10 Commercial Electronic Mail Act (CEMA) and RCW 19.86 et seq. the  
11 Washington State Consumer Protection Act (CPA).  
12  
13

14 2.5 This Court has diversity jurisdiction over the parties named herein as  
15 plaintiffs and defendants are residents of different states, and the complaint  
16 includes a prayer for relief in excess of \$75,000, exclusive of interest and  
17 costs.  
18  
19

20 2.6 Jurisdiction to commence this action is conferred by 15 U.S.C. §7701,  
21 *et seq.*, 15 U.S.C. §7707(g)(1); RCW 19.86.080, 19.86.090, 19.86.160, RCW  
22 19.190.030 and RCW 4.12.020-.025.  
23  
24

### 25 III. General Allegations

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1       3.1       Plaintiffs reallege and incorporate as though fully set forth herein, all  
2       prior paragraphs herein.  
3

4       3.2       Plaintiff Gordon is the registrant of the internet domain  
5       “gordonworks.com”.

6       3.3       Plaintiff Gordon is the registrant of the internet domain  
7       ‘gordonworks.com’, and is an interactive computer service as that term is  
8       defined in 15 U.S.C. §7703(11); 47 USC 231(e)(4); and RCW 19.190.010  
9       (7), and is the owner of an internet domain server, which, among others,  
10      hosts the ‘Gordonworks.com’ domain.  
11

12      3.4       Gordon provides or enables computer access by multiple users to a  
13      computer server that hosts the “gordonworks.com” domain name and further  
14      provides electronic mail accounts to individuals utilizing their personal  
15      domain names for electronic messaging, including individuals residing  
16      within the Federal judicial district in which this case is brought.  
17

18      3.5       Plaintiff Gordon is a user of the interactive computer service provided  
19      by ‘gordonworks.com’, and maintains electronic mail message accounts with  
20      ‘gordonworks.com, including under the address jim@gordonworks.com as  
21      well as the domain name “rcw19190020.com”.  
22

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1       3.6       At all times relevant to this action Plaintiff status as Washington  
2       residents is and was public knowledge and available to defendants upon  
3       request from the Plaintiff, their domain registrar information, and other  
4       readily accessible sources.

5  
6       3.7       The Defendants have initiated the transmission of numerous  
7       commercial email messages directed to and through Plaintiff's interactive  
8       computer service, and/or to and through Plaintiff's domain  
9       'gordonworks.com', and/or further addressed to Plaintiff Gordon's email  
10      addresses, including but not limited to jim@gordonworks.com.  
11  
12

13  
14      **IV. Causes of Action**

15           **4.1 First Cause of Action**

16  
17      **Violations of the Can-Spam Act of 2003 [15 U.S.C. §7701 et seq.]**

18      Plaintiff realleges all preceding paragraphs and incorporates them herein as if set  
19                  forth in full:  
20

21      4.1.1      Plaintiff has received thousands of commercial electronic mail  
22                  messages initiated by defendants, and/or by others on behalf of defendants,  
23                  and sent to Plaintiff's electronic mail server located in Benton and Franklin  
24                  Counties, Washington, and/or to its registered domains, including  
25

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1       ‘gordonworks.com’ in violation of the CAN-SPAM Act of 2003, 15 U.S.C.  
2           §7701 et seq.  
3

4       4.1.2 Plaintiff Gordon further alleges that he received numerous items of  
5           electronic mail initiated by the defendants, and/or by others on  
6           defendants’ behalf, and sent to the ‘gordonworks.com’ domain, and to  
7           email addresses served thereby, that were responded to with specific  
8           requests not to receive future commercial electronic mail messages, which  
9           requests went unheeded for a substantial amount of time during which  
10          defendants continued to send unlawful email to plaintiff in violation of 15  
11          U.S.C. §7704(a)(4).  
12

13       4.1.3 Plaintiff further alleges that the defendants initiated, or assisted others in  
14           the transmission of, at least one (1) separate item of electronic mail to the  
15           plaintiff to an address most likely harvested from domain name registration  
16           and/or by other means of anonymous internet information harvesting. Said  
17           conduct was in violation of 15 U.S.C. §7704(b)(1)(A)(i), and (ii).  
18

19       4.1.4 Plaintiff further alleges that defendants and/or others on behalf of  
20           defendants initiated the transmission of commercial electronic mail to  
21           plaintiff at and through his ‘gordonworks.com’ domain, and to individual  
22           plaintiffs.  
23

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1 email accounts at that domain and on its server, which electronic mail  
2 included materially misleading subject lines, which constitutes a violation of  
3 15 USC 7704(a)(2).

4 4.1.5 Plaintiff further alleges that defendants initiated, and/or assisted others  
5 in initiating the transmission of commercial electronic mail to plaintiff at and  
6 through the ‘gordonworks.com’ domain and to individual email accounts  
7 served thereby, which electronic mail failed to provide a functioning  
8 mechanism, clearly and conspicuously displayed, that a recipient may use, in  
9 a manner specified in the message, to request not to receive further messages  
10 from the sender, which constitutes violations of 15 USC 7704(a)(3)(A), and  
11 7704(a)(4)(A)(ii).

12 4.1.6 Plaintiff further alleges that defendants initiated and/or assisted others  
13 in initiating the transmission of commercial electronic mail to plaintiffs at and  
14 through the ‘gordonworks.com’ domain to individual email accounts served  
15 thereby, which electronic mail failed to provide clear and conspicuous notice  
16 that the mail is an “advertisement”, which constitutes a violation of 15 USC  
17 7704(a)(4)(A)(i).

18 4.1.7 As a proximate result of said unlawful conduct by said defendants,  
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1 Plaintiff is entitled to damages for the actual monetary loss incurred or  
2 statutory damages in the amount of up to \$100.00 in the case of violation of  
3 Section 5(a)(1) or up to \$25.00 in the case of each violation of the other  
4 subsections of Section 5 in the form of statutory damages as set forth in 15  
5 U.S.C. §7707(g)(1) and (3)(A).

6  
7 4.1.9 Plaintiff furthermore seeks a preliminary and permanent injunction  
8 against the defendants for their current and future violations of the CAN-  
9 SPAM Act of 2003 as it and members of the general public will continue to  
10 incur damages as a result of the unlawful conduct of said defendants. The  
11 seeking of injunctive relief by the plaintiff is specifically authorized by 15  
12 U.S.C. §7707(g)(1)(A).  
13  
14

15 4.1.6 Plaintiff furthermore seeks their attorney fees and costs against the  
16 defendants pursuant to 15 U.S.C. §7707(g)(4).  
17  
18

19 **4.2 Second and Third Causes of Action**

20 **Violations of the Washington CEMA [RCW 19.190.020 et seq.]**

21 **and the Washington Consumer Protection Act [RCW 19.86 et seq.]**

22 Plaintiffs reallege all preceding paragraphs and incorporates them herein as if set  
23 forth in full:  
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1       4.2.1     It is a violation of RCW 19.190.020(1)(a)(b) and 19.190.030(1)(a)(b)  
2                  to initiate the transmission, conspire with another to initiate the transmission,  
3                  or assist the transmission, of a commercial electronic mail message from a  
4                  computer located in Washington or to an electronic mail address that the  
5                  sender knows, or has reason to know, is held by a Washington resident that  
6                  uses a third party's internet domain name without permission of the third  
7                  party, or otherwise misrepresents or obscures any information in identifying  
8                  the point of origin or the transmission path of a commercial electronic mail  
9                  message, or contains false or misleading information in the subject line.  
10

11       4.2.2     Defendants initiated the transmission, or assisted and/or conspired to  
12                  transmit numerous commercial electronic mail messages to Plaintiff's  
13                  domain and server, and to Plaintiff Gordon's individual email account which  
14                  defendants knew, or had reason to know were located in the state of  
15                  Washington, which emails misrepresented or obscured information  
16                  identifying the point of origin or the transmission path, and/or which  
17                  contained false or misleading information in the subject line, which  
18                  constitutes violations of RCW 19.190 et seq.  
19

20       4.2.3     It is further a violation of RCW 19.190.080 to "solicit, request, or take  
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any action to induce a person to provide personally identifying information by means of a web page, electronic mail message, or otherwise using the internet by representing oneself, either directly or by implication, to be another person, without the authority or approval of such other person.”

Numerous emails sent by Defendants and received by Plaintiff violated this provision of the CEMA.

4.2.4 Pursuant to RCW 19.190.020(1)(a)(b), each email sent in this Second Cause of Action is a separate and distinct violation of RCW 19.190, and pursuant to RCW 19.190.030(1)(a)(b), (2), and (3) constitutes a separate and distinct violation of the Consumer Protection Act, RCW 19.86.

4.2.5 Further, defendants' acts herein alleged, constitute separate and distinct violations of RCW 19.86 as they constitute unfair or deceptive acts and practices, occurring in the regular course of defendants' conduct of commerce and trade, and are unfair methods of competition, which acts have been, or are likely to be perpetrated against other residents of the State.

Plaintiff has been damaged as a result of Defendants' statutory violations as set forth herein, in an amount to be proven at trial.

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2                   **4.3Fourth Cause of Action**

3

4                   **RCW 19.170 et seq.**

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6                   Plaintiff realleges all preceding paragraphs and incorporates them herein as if  
7                   set forth in full:

8

9                  4.3.1       RCW 19.170 et seq. makes it unlawful under Washington State law to  
10                 deceptively advertise or promote “free” prizes, gifts, awards, travel coupons  
11                 or certificate, free item, or any other item offered in a promotion that is  
12                 different and distinct from the goods, service, or property promoted by a  
13                 sponsor. The statute makes a violation of RCW 19.170 a per se violation of  
14                 the State Consumer Protection Act (RCW 19.86 et seq.)

15

16                  4.3.2       Numerous email advertisements, i.e., “spam” which Defendants  
17                 transmitted to Plaintiff, as described herein, violated RCW 19.170 et seq., in  
18                 the following ways: In violation of RCW 19.170.030:

19

- 20                 (a) The offending emails contained offers, and promotions for  
21                 prizes, gifts, and awards which failed to identify the name and  
22                 address of the promoter and the sponsor of the promotion;  
23                 and/or,  
24                 (b) failed to state the verifiable retail value of each prize offered in  
25                 it; and/or,  
26                 (c) failed to disclose the verifiable retail value and odds for each  
27                 prize which must be stated in immediate proximity on the same

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1 page with the first listing of each prize in type at least as large as  
2 the typeface used in the standard text of the offer; and/or

- 3 (d) failed to conspicuously disclose, if a person is required or  
4 invited to view, hear, or attend a sales presentation in order to  
5 claim a prize that has been awarded, may have been awarded, or  
6 will be awarded, the requirement or invitation must be  
7 conspicuously disclosed under subsection (7) of this section to  
the person in the offer in bold-face type at least as large as the  
typeface used in the standard text of the offer; and/or,
- 8 (e) or failed to otherwise comply with RCW 19.170.030 which  
9 requires that "No item in an offer may be denominated a prize,  
10 gift, award, premium, or similar term that implies the item is  
11 free if, in order to receive the item or use the item for its  
12 intended purpose the intended recipient is required to spend any  
13 sum of money, including but not limited to shipping fees,  
14 deposits, handling fees, payment for one item in order to receive  
15 another at no charge, or the purchase of another item or the  
expenditure of funds in order to make meaningful use of the  
item awarded in the promotion. The payment of any applicable  
state or federal taxes by a recipient directly to a government  
entity is not a violation of this section."

16 In violation of RCW 19.170.040:

- 17 (a) included a prize in an offer when the promoter or sponsor knows  
18 or has reason to know that the prize will not be available in a  
19 sufficient quantity based upon the reasonably anticipated  
response to the offer.
- 20 (b) failed to comply with subsection (5) which provides: "If the  
21 prize is not available for immediate delivery to the recipient, the  
22 recipient shall be given, at the promoter or sponsor's option, a  
23 rain check for the prize, the verifiable retail value of the prize in  
24 cash, or a substitute item of equal or greater verifiable retail  
value."

- (c) failed to comply with subsection 5(b), which provides: "If the rain check cannot be honored within thirty days, the promoter or sponsor shall mail to the person a valid check or money order for the verifiable retail value of the prize described in this chapter."
  - (d) failed to comply with subsection (6), which provides: "A sponsor shall fulfill the rain check within thirty days if the person named as being responsible fails to honor it."
  - (e) failed to comply with subsection (7) , which provides: "The offer shall contain the following clear and conspicuous statement of recipients' rights printed in type at least as large as the typeface used in the standard text of the offer:" If you receive a rain check in lieu of the prize, you are entitled by law to receive the prize, an item of equal or greater value, or the cash equivalent of the offered prize within thirty days of the date on which you claimed the prize."
  - (f) failed to comply with subsection (8) , which provides: "It is a violation of this chapter to misrepresent the quality, type, value, or availability of a prize."

4.3.3 On at least one occasion, Plaintiff attempted to claim a free prize.

4.3.4 No free prize was ever received. Instead, Plaintiff received a torrent of spam that has not ended to this day.

#### **4.3.5 Plaintiff was damaged thereby.**

**5. Demand for jury.** Plaintiff demands that this cause be tried to a jury.

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## **PRAYER FOR RELIEF**

Plaintiff prays for relief as follows:

That the Court adjudge and decree that defendant has engaged in the conduct complained of herein.

That the Court adjudge and decree that the conduct complained of herein constitutes violations of the Federal Can-Spam Act of 2003, 15 U.S.C. §7705, and that Plaintiff are entitled to all damages provided for thereunder, as may be proved at trial;

That the Court adjudge and decree that the conduct complained of herein constitutes violations of the Washington Commercial Electronic Mail Act, RCW 19.190 et seq., and that Plaintiff is entitled to all damages provided for thereunder, as may be proved at trial, including but not limited to treble damages of up to three times the per statutory damages provided therein for each violation committed by the defendants, in an amount to be proven at trial;

That the Court adjudge and decree that the conduct complained of herein constitutes violations of RCW 19.170 et seq. and that Plaintiff is entitled to all damages provided for thereunder, as may be proved at trial, including but not limited to aggravated damages under RCW 19.170.060 of up to three times the

1 amount of statutory damages for these violations committed by the defendants  
2 willfully and knowingly, and for defendants' unlawful activity.  
3

4 That the Court adjudge and decree that the conduct complained of herein  
5 constitutes violations of the Washington Consumer Protection Act, RCW  
6 19.86 et seq., and that Plaintiff is entitled to all damages provided for  
7 thereunder, as may be proved at trial;

8 That the Court assess civil penalties, pursuant to 19.190.040(1) of five  
9 hundred dollars (\$500) per violation against defendant for each and every one  
10 of the commercial electronic mail messages sent to plaintiff Gordon in  
11 violation of RCW 19.190.020.

12 That the Court assess civil penalties, pursuant to 19.190.040(1) one thousand  
13 dollars (\$1,000) per violation against defendant for each and every one of the  
14 commercial electronic mail messages sent through plaintiff Gordon's  
15 interactive computer service in violation of RCW 19.190.020.

16 That the Court assess civil penalties in the way of treble damages pursuant to  
17 RCW 19.86.140, of two thousand dollars (\$2,000) for each and every one of  
18 the violations of RCW 19.86 caused by the conduct complained of herein.

19 That the Court enter judgment pursuant to RCW 19.86.140 providing that

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1 Plaintiff has been injured by the conduct complained of herein, and ordering  
2 that Plaintiff recover from the defendant the costs of this action, including  
3 reasonable attorney's fees.  
4

5 That the Court order such other relief as it may deem just and proper to fully  
6 and effectively remedy the effects of, and prevent future instances of, the  
7 conduct complained of herein, or which may otherwise seem proper to the  
8 Court.  
9

10 DATED this 11<sup>th</sup> day of September, 2006.  
11

12 **MERKLE SIEGEL & FRIEDRICHSEN, P.C.**  
13

14 /s/ Robert J. Siegel  
15 Robert J. Siegel, WSBA #17312  
16 Attorneys for Plaintiffs  
17  
18  
19  
20

21 **Certificate of Service**  
22

I, hereby, certify that on September 11, 2006, we filed this pleading with  
this Court. The Clerk of the Court will provide electronic notification

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1 system using the CM/ECF, which will send an electronic copy of this  
2 Notice to: Floyd E. Ivey, Peter Glantz, Sean Moynihan, and all counsel  
3 of record herein.  
4  
5  
6

7 /S/ Robert J. Siegel  
8 Robert J. Siegel, WSBA #17312  
Attorneys for Plaintiffs  
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